88-165

Supreme Court, U.S.
FILED
JUL 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

JOHN F. ROMANN

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION

- and -

THE AMERICAN BOARD OF TRADE INC.,et al

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John F. Romann, Pro se
Box 312, R.D. #4
Easton, PA. 18042

(215) 252 - 7259

Appellant
Petitioner

TO: The Honorables, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John F. Romann, is acting on behalf of himself, and his family, all citizens of the U.S.A. by birth. He is not affiliated with the American Board of Trade Service Corp., Mr. Arthur N. Economou, or Mrs. Phyllis Economou in any way.

This request is made that a WRIT OF CERTIORARI issue to review why a denial of a rehearing en banc in the U.S. Court of Appeals-Second Circuit, entered April 25, 1988, on petition following U.S. Court of Appeals substantial affirmation (filed October 23, 1987) of Special Masters report and the confirming Memorandum and Order (83 CIV 6213 (KRAM) USDC, SDNY, February 2, 1987.

QUESTIONS PRESENTED FOR REVIEW

Having been fore-warned by the U.S. Court of Appeals-Second Circuit, of the harmful consequences which could follow, should agents of the U.S. government have been permitted to secure a search warrant under false pretenses from a District Magistrate, enabling the government to over-ride an "extended stay".The stay was not a week old. It was issued by the U.S. Court of Appeals-Second Circuit.

Did the manner in which the search warrant was secured, as cited by the U.S. Court of Appeals-Second Circuit in SEC V. ABT 798 F 2d 45-47 2d Cir (1986), consummate an unreasonable search and seizure, and was this a violation of the Fourth Amendment, U.S. Constitution, the supreme law of the land?

If files and records are seized illegally, is this considered a criminal act?

Should criminals be trusted with the custody and contents of files which could have been seized illegally?

Did Congress fail to act "in strict subordination to constitutional and lawful safeguards to individuals", in matters of regulation where the business of trading in securities is subject?

Does the U.S. Constitution permit a District Court judge to order a corporation's assets to be "liquidated" without a trial by jury?

Does the U.S. Constitution permit agents of government to act in a harmful manner toward citizens of the U.S.A., i.e. the loss of property owned by citizens of the U.S.A.?

PARTIES TO THE PROCEEDING

Securities & Exhange Commission
26 Federal Plaza
New York, New York 10278
by: Charles Padgett

The American Board of Trade Service Corporation.
Att: Mr. Milton S. Gould , ESQ.
Special Master and Interim Receiver
SHEA & GOULD
330 Madison Avenue
New York, N.Y. 10017

Arthur N. Economou and Phyllis H. Economou
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New York, New York 10128

Solicitor General
Department of Justice
Washington, D.C. 20530

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APPENDIX

Appendix A SUMMARY ORDER, US COURT OF APPEALS-SECOND CIRCUIT, Docket No. 87-6081, October 23,1987.

Appendix B - DENIAL - Rehearing en banc. U.S. Court of Appeals, 2nd Circuit, Docket 87-6081, April 25, 1988.

Appendix C -Mandate issued by U.S. Court of Appeals-2nd Circuit, Denial of Rehearing en banc, Docket 87-6081, April 25, 1988.

Appendix D Letter to Petitioner from the Acting Director, SEC, September 25, 1986.

Appendix E Letter from Congressman Don Ritter to Congressman Edward J. Markey, M.C., February 4, 1987.

Appendix F Letter from Congressman Don Ritter to Petitioner, April 2,1987, re. custody of Search Warrant.

Appendix G Letter from Congressman Don Ritter to petitioner, June 8, 1988.

A Supplemental Appendix follows page G-2, at the end of this booklet.

TABLE OF AUTHORITIES

Cases

Archer v. SEC, C.C.A. 1943, 133 F. 2d 795, certiorari denied 63 S.Ct. 1330, 319 U.S. 767, 87 L.Ed.1717
(Quote on Page 49)

Pages- vii, (4), (36) (49)

Boyd v. U.S. 116 US 616, 635, (1885)
(Quote on Page 19)

Pages- (vii), (19), (22)

Exchange National Bank v. Touche Ross & Co. 544 F.2d 1127, 1138 (2d Cir. 1976)

Pages- (vii), (32) (50)

Hecht Co. v. Bowles, supra, 321 U.S. at 329-30. Quote on page (4),(22)

Pages- (vii), (4),(5),(22), (37), (42), (51)

"members of a corporation... shall not be...deprived of their liberties or property, unless by a trial by jury."
N. Carolina v. Foy, 2 HAY, 310, 312: 5 N. Car57,63 (1804)

Pages- (vii), (38), (52)

"Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to the citizen"
Olmstead v.U.S. 277 US 438 485: 48 S Ct. L Ed944 (1928)

Pages- (viii), (53)

SEC v ABT Inc. 751 F.2d 529 (2d Cir. 1984)

Pages-(viii),(1),(10),(13),(18),(22), (25-34),(37),(41-45),(50),(51)

SEC v ABT Inc. 793 F.2d 43 (2nd Cir. 1986)

Pages- (iii),(viii),(1),(3),(7),(11), (19),(23),(33),(39),(41),(45)

SEC v. Harwyn Industries Corp. DCNY 1971, 326 F. Supp. 943

Pages- (viii), (9),(23)

"the jury...acts not only as a safeguard against judicial excesses, but also as a barrier to legislative and executive oppression. The Supreme Court...recognizes that the jury... is designed to protect Defendants against oppressive governmental practices."

U.S. Supreme Court, U.S. ex rel Toth V. Quarles, 350 US 11, 16 (1955)

Pages- (viii), (25),(38),(53)

Codes

U.S.Code 15 & 77e Para.5 POWER OF CONGRESS
(Quoted on page 49)

Pages-(ix), (3),(8),(49)

U.S. Code 15 & 77e Para. 6 PERSONS PROTECTED
(Quoted on page 23)

Pages- (ix), (22),(23)

Orders:

MEMORANDUM OPINION AND ORDER, 83 Civ. 6213 (SWK)USDC SDNY Feb.2, 1987 SEC v ABT Inc., Arthur N. Economou, Phyllis H. Economou, and the American Board of Trade

Pages-(i),(ix),(1),(7),(12),(13),(42) (46),(49)

SUMMARY ORDER, Oct. 23, 1987, U.S. Court of Appeals-Second Circuit, Affirmation of order appealed from, SDNY 83 CV 6213 KRAM, SEC v ABT, Inc. Arthur N. Economou, Phyllis H. Economou, and the American Board of Trade

Appellant John F. Romann, appeared pro se. DOCKET 87-6081. Lead Docket 87-6089 (APPENDIX A)

Pages- (i),(ix),(2),(14)

ORDER, April 25, 1988, U.S. Court of Appeals-Second Circuit, Denial of petition for rehearing containing a suggestion that the action be reheard in banc.
SEC v ABT , et al,
Appellant, John F. Romann appeared pro se, Docket 87-6081, Lead Docket 87-6089. (APPENDIX B)
Pages-(i),(x),(2),(16)

MANDATE issued by U.S. Court of Appeals-Second Circuit, May 3, 1988, listing appellants Docket #87-6081 with 87-6089, 6077, 6082, 6091, 6071, 6090, 6092.
SEC v AM BD OF TRADE ET. EL
Denying of a petition for rehearing containing suggestion that action be reheard in banc, submitted by appellant pro se John F. Romann, was DENIED. (APPENDIX C)

Pages- (x),(2)

Reports

REPORT OF SPECIAL MASTER AND INTERIM RECEIVER, Milton S. Gould, ESQ., 330 Madison Ave. New York, NY 10017 (212) 370-8000.
SEC v. ABT Inc., Arthur N. Economou, Phyllis H. Economou, and THE

AMERICAN BOARD OF TRADE SERVICE CORP.
83 CIV. 6213 (SWK) USDC SDNY

Pages- (x), (11),(32),(35)

Report of Securities and exchange Commission to the Special Sub Committee on Investigations VIII (1972) (Commissioner calling on Congress to amend &3(a)(3) "in order to provide more definite standards"

Pages- (xi),(32),(33)

Hearings on HR 4134 Before The House Committee on Interstate & Foreign Commerce. 73rd Cong. 1st Session 181-184(1933) HR Rep. No. 85, 73rd Cong., 1st Session 15 (1933) describing &3a(3) as exempting short term paper, "of a type which rarely is bought by private investors." S.Rep. No. 47, 73d Cong., 1st Session 3-4 (1933).
Pages-(xiii) (31)

Rules

Rules of the Supreme Court of The United States, Adopted April 14, 1980, Effective June 30, 1930

Rule

(9)(11)(12)(15)(17)(19)(28)(30)(33)

Statutes

Securities Act of 1933 and 1934

Pages- (viii),(4),(19),(25),(35)

CONSTITUTIONAL PROVISIONS INVOKED

Article I. Section 8: "The Congress shall have POWER to.....establish uniform Laws on the subject of Bankruptcies throughout the United States .....

Pages- (xii),(47)

Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a a redress of grievances.

Pages: (xii), (7)

Amendment IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Pages (xiii),(7), (25),(35) (40),(52)

Amendment V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law nor shall private property be taken for public use, without just compensation.

Pages: (xiii), (7) (19), (52)

Amendment VII. In suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United than according to the rules of the common law.

Pages: (xiv), (38) (52)

Amendment IX. The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.

Pages: (xiv), (7)

Amendment X. The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people

Pages: (xiv),(7), (18),(52)

OPINIONS BELOW

The two opinions of the U.S. Court of Appeals - Second Circuit, whose judgment is sought to be reviewed are reported as SEC v. ABT Inc., 751 F 2d 529 (2d Cir 1984), and SEC v. ABT Inc. 798 F 2d 45 (2d Cir 1986). The prior opinion of the United States District Court - Southern District, New York, is cited in the Memorandum Opinion and Order, 83 Civ.6213,(SWK) issued by judge Kram.

(See Supplemental Appendix H)

JURISDICTION

The judgment of the U.S. Court of Appeals - Second Circuit confirming Memorandum & Order to the District Court was filed on October 23, 1987(APPENDIX A)

A timely petition for a rehearing en banc was denied on April 25, 1988. (APPENDIX B)

A mandate pertaining to the denial of rehearing en banc was issued on May 3, 1988. (APPENDIX C)

The petitioner makes this timely request for WRIT OF CERTIORARI within 90 days from April 25, 1988.

This Courts Jurisdiction is invoked pursuant to certification for interlocutory appeal in the United States District Court of New York, on or before March 9, 1987, under 28 USC 1292(b).

a. The Court of Appeals - Second Circuit

has rendered two decisions pertaining to the Securities Act of 1933 and 1934 in regard to the registration of three month and six month commercial paper notes. These decisions appear to be in conflict. Conflicting decisions have curtailed the marketing of commercial paper notes formerly marketed by the American Board of Trade Services Inc., New York City, by forcing the firm out of business. The U.S. District Court in New York City has ordered that all remaining assets of ABT Inc. and their affiliates, "be liquidated".

The two court case decisions which could be in conflict are -

I. SEC v. ABT 751 F 2d 529 2d Cir (1984)

II. SEC v. ABT 798 F 2d 45 2d Cir (1986)

b) the decision of the 1984 Court (I above) was (1) in conformity with

constitutional and lawful safeguards to individuals. US Code 15 &77e (para.5) Archer v. Securities and Exchange Commission, C.C.A. 1943 133 F.2d 795, certiorari denied 63 S.Ct. 1330, 319 U.S. 767, 87 L.Ed.1717. The decision was also (2) in conformity with the Supreme Court statement in Hecht Co. v. Bowles, supra, 321 US at 329-30, which states...

"The historic injunctive process was designed to deter, not to punish. The essence of equity jursidiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as

between competing private claims....."

The decision of the 1986 Court (II above) was NOT in conformity with constitutional and lawful safeguards to individuals, nor in conformity with the Supreme Court's statement in Hecht Co. v. Bowles, supra, 321 U.S. at 329-30.

c) There is a conflict. There appears to have been a concern on the part of the U.S. Court of Appeals-Second Circuit. The Court had not yet completed their determination of the legality of the marketing of the unregistered commercial paper securities, sold by the American Board of Trade Inc. The Court had just issued a second "stay" of the U.S. District Courts injunction within 30 days.The stay was issued on June 26, 1986. Without any knowledge of the two stays issued on June 10, 1986, and June 26, 1986, a search warrant was issued to the

government by District Magistrate, Nina Gershon in New York City. The record shows, S.E.C. v ABT Inc., 798 F.2d 45 (2nd Cir.1986) at p.47, that "The Magistrate was not informed about the nature of the appeal pending the the U.S.Court of Appeals-Second Circuit, or about the stays that had been issued". (June 10, 1986 and June 26, 1986). The issuance of the search warrant was inconsistent with the "stay" extended just three business days before. The execution of the search warrant by the lower court vitiated the purpose of the stay issued by the higher Court of Appeals, and was DIRECTLY responsible for the loss of property to investors, a grand total of approximately $79,000,000. (The figure is stated in the voluminous copy of the court appointed Special Master and Interim Receiver's report

dated November 4, 1986 on page 4.) A limited number of copies of this report are available at the request of the Court. The devastating loss is also confirmed by Judge Kram in her Memorandum Opinion and Order 83 Civ.6213 USDC, SDNY, February 2, 1987. **(See Supp. Appendix H)**

e) The Supreme Courts jurisdiction is invoked under Section 2, Article 3 of the U.S. Constitution, the supreme law of the land, which supersedes all other laws, rules and regulations in that "the Judicial power of this Court shall extend to all cases in Law and Equity, arising under this Constitution.

U.S. Constitution, Amendments I,IV,V, VII, and IX, and X

The petitioner carefully cites the above, as he is of the opinion, that in filing his brief on appeal in the U.S. Court of Appeals Second Circuit (pro se) it was

grouped in with seven other Dockets (see page (xii) and APPENDIX C). Petitioner was granted five minutes to speak before the U.S. Court of Appeals-Second Circuit. He (not being an Attorney) was not permitted to argue, and did not mention the issue, feeling that the other issues involved were of a much higher priority. It is conceivable that the greater number of appeals submitted with petitioners brief were concerned with the law in regard to special treatment for ABT's Treasury Bill and Spot Commodity customers in the liquidation proceedings. Petitioners brief on appeal did NOT relate to the above mentioned issue, as he and his family were commercial paper holders, and not entitled to any priority in the distribution of assets. The eight dockets were taken "on submission". (See Supplemental Appendix J & M)

CONCISE STATEMENT OF THE CASE

US Code 15 & 77e para.6 Persons Protected

"This section is designed not only to protect immediate recipients of distributed securities, but also subsequent purchasers from them."

Securities and Exchange Commission v. Harwyn Industries Corp. D.C.N.Y. 1971 326 F.Supp 943

September 23, 1983: The SEC brought legal action against ABT alleging illegal sales of so called "commercial paper" (short term, 3 month and 6 month notes), issued by the ABT Service Corp. The action, SEC v. ABT Inc. et al, 83 Civ. 6213 (SWK) USDC SDNY. terminated with the District Court's preliminary injunction against further sales of commercial paper.

December 26, 1984: On appeal before the U.S. Court of Appeals-Second Circuit, SEC v. ABT, 751 F 2d 529 2nd Cir (1984) at 530, the record plainly states that "the SEC made no claim that any investor had been, or had been likely to be financially hurt". The U.S. Court of Appeals reversed a preliminary injunction ordered by the District Court, and a remand for the issuance of a more limited injunction.

May 20, 1986: Based upon partial financial data, the SEC informed the district court that ABT Service appeared to be grossly insolvent, and was becoming increasingly insolvent as note sales continued, with consequent harm to existing noteholders. (APPENDIX D)

June 10, 1986: The U.S. Court of Appeals, Second Circuit stayed an injunction

against ABT's sales and redemption of commercial paper, until a present appeal could be heard. The stay was issued over vigorous arguments of the SEC. SEC v ABT Inc. 798 F 2d 45 2nd Cir (1986) at 46

June 26, 1986: The June 10th stay was extended by the U.S. Court of Appeals, Second Circuit.SEC v. ABT Inc. 798 F 2d 45 2nd Cir. (1986) at 46

June 30, 1986: The government secured a search warrant from Magistrate Gershon, U.S. District Magistrate, New York City, the effect of which was to enable the government to seize all of ABT Services records, and thereby force ABT to cease doing business. SEC v. ABT Inc. 798 F 2d 45 2nd Cir. (1986) at 46

November 1986: Petitioner received a NOTICE OF HEARING TO CONSIDER SPECIAL

MASTER'S AND INTERIM RECEIVER'S REPORT AND RECOMMENDATIONS, from the Court Appointed Receiver. This was a copy of that which was addressed to ALL CUSTOMERS AND CREDITORS OF THE AMERICAN BOARD OF TRADE INC. The copy originated at the U.S.District Court, Southern District of New York, 83 Civ. 6213 (SWK), dated November 10, 1986. The hearing was to be held in the U.S. District Court, Foley Square, New York on January 19, 1987, and the Court had set a January 5, 1987 bar date for receipt of any written objections to the Receivers report.
(Note: The Receivers Report consisted of 147 pages, 8 1/2 x 11, double spaced).

December 29, 1986: Petitioner mailed thirteen pages of written objections to the Receivers Report, Certified Mail, Return Receipt Requested.

January 8, 1987: Petitioner received a receipt from the Clerk, U.S. District Court acknowledging receipt of copy of objections on January 5, 1987.

January 19, 1987: Petitioner attended scheduled hearing, and was permitted to read his Objections to the Receivers Report before Judge Kram in open court room. NO JURY WAS PRESENT IN THE ROOM.

February 2, 1987: Judge Kram, USDC SDNY issued order stating that "The Court agrees that ABT should be liquidated pursuant to the recommendations set forth in the report. (page two of a 19 page MEMORANDUM OPINION AND ORDER, 83 CIV 6213 USDC SDNY(SWK) **(Supp.Appen.H, Page SA H-2)**

March 3, 1987: Petitioner filed PROOF OF CLAIMS in the U.S. District Court as per instructions from the Receiver, for

monies owed to himself and his family, a grand total of $ 48, 801.26.

May 5, 1987: Civil Appeal Scheduling Order #1, U.S. Court of Appeals, Second Circuit, SEC v ABT-83 CIV 6213,USDC,SDNY, Docket No. 6081 (lead docket 87 6069) issued by U.S. Court of Appeals-Second Circuit.

May 15, 1987: Petitioner paid filing fee of $70.00 to U.S. Court of Appeals, Second Circuit, and filed the required number of briefs with the Court of Appeals. **(See Supplemental Appendix K)**

September 10, 1987: Petitioner acknowledged FIRM NOTICE, from Elaine B. Goldsmith, Clerk, U.S. Court of Appeals, Second Circuit. A Hearing before the U.S. Court of Appeals would be granted at 10A.M. on October 5, 1987. The

petitioner-appellant would appear pro se. Petitioner-appellant's appeal "would be taken on submission".

October 5, 1987: Petitioner appeared at scheduled hearing before the U.S. Court of Appeals-Second Circuit, and requested an opportunity to speak. Petitioner was granted five minutes before three Judges, two from the Court of Appeals and a District Court Judge sitting by designation. As the petitioner was not an attorney, and appearing pro se, no argument was heard, and no questions were asked. Upon completion of the hearing, the petitioner was advised by the Chief Judge, that decision would be reserved. The Chief Judge (Judge Pierce) was one of the three Judges who presided in SEC v. ABT Inc., 751 F 2d 529 2d Cir. (1984)
NO JURY WAS PRESENT AT THE HEARING.

October 23, 1987: The U.S. Court of Appeals-Second Circuit issued and filed a Summary Order, (APPENDIX A), stating that the District Court Order, 83 CIV 6213 USDC SDNY (SWK) appealed from be affirmed.

November 4, 1987: Petitioner filed petition in the U.S. Court of Appeals-Second Circuit, requesting the action be reheard "en banc"

December 22, 1987: Petitioner and members of his family received a settlement from the court appointed Receiver on ABT claims submitted, totaling $ 10, 748.00

January 12, 1988: Petitioner and his wife received an additional settlement of $ 124.00.

April 25, 1988: A DENIAL of a petition for rehearing containing a suggestion

that the action be reheard in banc by appellant pro se, was filed in the U.S. Court of Appeals - Second Circuit. (APPENDIX B)

The petitioner, his wife and children were hurt financially as a direct result of UNLAWFUL action initiated in the courts by the SEC, an agency of the U.S. Government, responsible to protect investors in securities.

Prior to the seizure of all of their records by government agents, ABT Inc. had been making regular payments on all notes and obligation when due.

There are no complaints on the Court record from any ABT customers.

The securing of the search warrant from the District Magistrate, over a "harmless" issue (see pg.30,34) involving registration of commercial paper notes sold by ABT Inc., was directly

responsible for the loss of petitioners investment in the commercial paper notes.

The lawful registration of short term commercial paper notes is still an issue which has never been clarified by the courts. SEC v ABT Inc. 751 F 2d 529 2d Cir (1984) at 540 (APPENDIX E,) (APPENDIX F), (APPENDIX G) TENTH AMENDMENT, U.S. Constitution.

The record states "that the sealed affidavit (APPENDIX F), (relied upon in obtaining the search warrant from the Magistrate) was reviewed by the U.S. Court of Appeals, Second Circuit. The Magistrate was not informed about the nature of the appeal pending in the U.S. Court of Appeals, Second Circuit, or about the stays that had been issued by the U.S. Court of Appeals, Second Circuit. Indeed, the affidavit implied that the only stay in effect was issued

in December 1934, and justified the application for a warrant in part on the fact that ABT Services sale of unregistered commercial paper violated Section 5 of the 1933 Act, 15 USC &77e, an issue which was very much part of this appeal. The stays of June 10 and June 26 were intended to allow ABT Service to continue to market its commercial paper until the legality of that marketing could be determined by the U.S. Court of Appeals-Second Circuit on appeal."SEC v ABT Inc. 798 F 2d 45 2nd Cir. (1986) at 47 "It is the duty of the courts to be watchful for the CONSTITUTIONAL RIGHTS of the citizen, against any stealthy encroachments thereon". Boyd v U.S., 116 US 616, 635 (1885)

Contrary to the rights in the Fifth Amendment, guaranteed by the U.S. Consti-

tution, "persons were deprived of liberty and property, without due process of law, and private property was taken for public use (or mis-use)* , without just compensation".

*( ) parenthesis added, as there was no jury to decide, as to whether the records seized by the SEC were properly used or mis-used.

The record is sparse as to the condition of books and records after the seizure, and in storage at the Federal Office Building, 267 Federal Plaza, N.Y.C. There is a footnote, #5 on page 9, of the 147 page report prepared by the Special Master and Interim Receiver, part of which says, "In order to locate the records they required,the accountants had to consult hastily prepared inventory sheets in order to ascertain which of the more than 700 boxes of seized material

contained the documents they required, and were then required to locate and extricate the box itself. These difficult working conditions greatly lengthened the time Coopers & Lybrand required to compile its examination and report, and consequently, substantially increased both the cost of Coopers & Lybrand's services and the time required for completion."

The very basic issue concerned with this request, is the issuance of the search warrant by the District Magistrate. A secondary issue, is priorities of protection for present and future investors. The record, based upon the law is very clear.The U.S. Court of Appeals, Second Circuit, had designed a plan, and was in the process of monitoring the plan only three days prior to the issuance of the search warrant.

The plan, based upon the U.S. Supreme Court statement in Hecht Co. v. Bowles, supra, 321 U.S. at 329-30" was alluded to more than once in SEC v. ABT Inc. 751 F.2d 529 (2d Cir. 1984) at 543.

" The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

The plan in effect , when the last stay was issued on June 26, 1986, was under the watchful eye of the U.S.Court of Appeals, and "in process of protecting" invested monies of citizens of the United States of America.

Boyd v U.S.,116 U.S 616, 635 (1885)

USC 15 & 77e para. 6 PERSONS PROTECTED-

"This section is designed not only to protect immediate recipients of distributed securities, but also subsequent purchasers from them."

Securities & Exchange Commission v. Harwyn Industries Corp. SDNY, 1971 326 F. Supp.943

When government agents applied for a search warrant on June 30, 1986, as stated in the record, SEC v. ABT Inc., 798 F.2d 45 (2nd Cir. 1986) at 47, "The Magistrate was entitled to know that the legality of the sales of ABT Services commercial paper was at issue in an appeal pending before the U.S. Court of Appeals-Second Circuit, and that a stay allowing the sale of that paper had been granted. Such information was relevant to probable cause and might have led the Magistrate to condition execution of the warrant upon measures which would have been consistent with the stay granted by the U.S. Court of Appeals-Second Circuit."

Was consistency of the decision making process of the U.S. Court of Appeals-Second Circuit altered by the circumstances surrounding the securing of the search warrant?

Because the "conditioning" of the execution of the search warrant had developed into a definite concern of the U.S. Court of Appeals-Second Circuit, was the Court now forced to reconsider the legality of commercial paper under different circumstances? The law in regard to the registration of short term commercial paper notes had NOT changed since 1984. Was the "power of the Chancellor to do equity suddenly taken from him, after moulding each decree to the necessities surrounding this particular case? Was equity squelched by fraud and/or deception? Could this have been prevented by a "probable cause jury"

FOURTH AMENDMENT, U.S. Constitution

United States ex rel Toth v. Quarles, 350 US 11, 16 (1955)

Based upon the written history of the two cases in conflict, the petitioner questions the degree of familiarity the 1986 Court had assumed with the history and law cited by the 1984 Court, concerning the registration of short term commercial paper notes?

The U.S. Court of Appeals-Second Circuit in SEC v ABT Inc., 751 F 2d 529 2nd Cir. (1984) at

Page 541 & 542.."as to the CP program, the SEC did not make out a prima facie case under &17 (a) of the 1933 Act or &10(b) of the 1934 Act or Rule 10b-5, and reach the final question, namely, whether defendants should be preliminarily enjoined from making sales of ABT commercial paper in the absence of

registration."

Page 542.. "We think defendants have demonstrated the need for a stay of an injunction against continued sales of CP reaching beyond the issuance of our mandate".

Page 538.. We are also impressed with ABT's having registered The American Board of Trade Government Fund, Inc. as an investment company, effective August 11, 1984, to engage in, among other transactions, exactly the kind of sales that had been made under the discontinued TB program. Taking all the circumstances into account, we hold that the district judge abused her discretion in finding a cognizable danger that, unless enjoined, ABT would revert to the peccadillos involved in the TB program."

Page 542 (footnote #14).."The district

court's position, that defendants should have made provisions long before for the prospect of being forced to redeem millions of dollars worth of commercial paper on short notice, fails to take into account the SEC's long acquiescence in the program."

Page 538....."..it was not unnatural for ABT to interpret the SEC's along inaction as indicating, if not acquiescence, at least that the SEC did not take the violations very seriously."

Page 530.."It concerns the propriety of the court's issuing, on suit of the Securities and Exchange Commission (SEC), a preliminary injunction broadly enjoining defendants from violating any of the federal securities laws in a case where the most serious alleged violations, to wit, failure to register certain

securities had been known to the SEC for 14 years..."

Page 538".The CP Program, in contrast to the TB program, ABT does advance a substantial although ultimately a losing argument that the CP program did not require registration under the 1933 Act. Section 3 (a) (3) exempts from coverage of the Act:

"Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited. The ABT notes issued under the program had maturities of only 3 or 6 months."

Page 537 {4} "Having said all this, we

must add that, while no violation of law can be deemed innocuous, the violations found with respect to the TB program came closer to being so than in any successful SEC enforcement action within our experience...There is no allegation, much less proof, that the bank which bought the TBs did not keep them properly segregated, that defendants diverted any of them to their own use, that the fees charged to the purchasers were not fully disclosed or were excessive, or that any investor ever suffered a loss or was in danger of doing so. To the contrary many of them wrote the SEC, albeit at ABT's suggestion, to express their satisfaction with the program; there is no evidence that any complained."

Page 543..."Our partial reversal here rests on a combination of circumstances

rarely encountered-the SEC's long delay in taking action with respect to violations it knew to exist, the essentially harmless character of such violations as we have found, defendants' continued expressions of willingness to desist from them and the actual discontinuance of the TB program, the failure of the district court to give detailed consideration to the justification or need for injunctive relief as to some of the violations, the inordinate breadth of the injunction that was issued, and the harm to investors from abrupt discontinuance of the CP program. In a case where one or more of these factors is absent, the result may well be different.

Page 539 & 540.."It is inconceivable that Congress intended &3(a)(3) to exempt from

registration a periodic public offering of the issuer's own notes to small investors simply because their maturity was less than nine months. Although the legislative history of &3(a)(3) is sparse, it is clear that one of the principal reasons short term commercial paper was exempted from the registration requirements of the 1933 Act was that Congress believed that unsophisticated small investors rarely purchased these instruments. (See Hearings on HR 4134 Before the House Committee on Interstate and Foreign Commerce, 73d Cong. 1st Sess 181-84 (1933); H.R. Rep. No. 85, 73d Cng., 1st Sess. 15 (1933) (describing &3(a)(3) as exempting short term paper "of a type which rarely is bought by private investors"); S. Rep. No. 47, 73d Cong., 1st Sess.3-4 (1933)

It is almost equally unlikely that

Congress meant that an issuer soliciting broad public investment in notes issued for general corporate purposes should be able to avoid the anti-fraud provisions of the 1934 Act simply by arranging that they should have "a maturity at the time of issuance of not exceeding nine months." It is, of course, unfortunate that Congress has not resolved these ambiguities about the status of notes under the 1933 and 1934 Acts WHICH HAVE PLAGUED THE COURTS AND PERSONS SUBJECT TO THE SECURITIES FOR DECADES. Exchange National Bank V. Touche Ross & Co., 544 F. 2d 1127, 1138 (22d Cir. 1976)Staff Report of the Securities and Exchange Commission to the Special Subcommittee on Investigations viii (1972) (Commission Chairman calling on Congress to amend &3(a)(3) "in order to provide more definite standards"). BUT UNTIL CONGRESS

TURNS ITS ATTENTION TO THE PROBLEM, WE MUST DO THE BEST WE CAN."

Granted, that the 1986 Court, SEC v ABT Inc. 798 F.2d 47 (2nd Cir. 1986) "assumed familiarity" with the law in SEC v. ABT Inc. 751 F 2d 529 (2d Cir. 1984). In making a comparison, however, between the records of the two cases in conflict, there was a quality and quantity of law stated in SEC v. ABT Inc. 751 F2d 529 (2d Cir. 1984), which seems to be missing SEC v ABT Inc. 798F. 2d 47 (2nd Cir..1986)

The laws on record in regard to commercial paper registration had not changed. The problem seems to have been an alternate plan. Could it have been a "deadline" set by the S.E.C., for ABT Inc. to provide, "certified financial information necessary for registration

available?

There also seems to be a resentful ABT Inc., to concur with the SEC requirement, based upon ambiguous wording in the law over long standing violations known to the SEC, and considered by the Court as "essentially harmless in character". SEC v. ABT Inc. 751 F 2d 529 (2d Cir. 1984) at 543

On the one side, a hostile SEC armed with ambiguous laws over violations "harmless in character". On the other side, ABT Inc., with a flawless record of operation over a fourteen year span. Between both sides, were a group of American citizens, some 9,100, who had money invested on a guaranteed return, which was never at fault, and who were VERY MUCH UNDER GOOD FIRM LAW entitling them to "protection". The U.S. Court of Appeals had been doing their best prior

to the "issuance of the search warrant". The SEC plan which included search and seizure resulted in a wipe out of all but a little more than 20% of commercial paper holders investments.

"Certified financial information" is a right to privacy under the Fourth Amendment. Why did the 1986 Court make make this an issue on July 17, 1986, and not on June 26, 1986, over ambiguous laws which the Congress has neglected to clarify?

Why didn't Congress act in 1972 or shortly thereafter, after being called upon by the Securities and Exchange's Chairman? As a result of the inability of Congress to resolve the ambiguities in regard to the status of commercial paper notes under the 1933 and 1934 Acts, this Writ of Certiorari is plaguing this Court at this time.

USC 15 & 77e para.5 POWER OF CONGRESS "The business of trading in securities is subject to Congressional regulations, BUT the regulations must be done in strict subordination to constitutional and lawful safeguards to individuals". Archer v. SEC., C.C.A. 1943 133 F 2d 795 certiorari denied 63 S.Ct 1330, 319 US 767,87 h ED 1717.

Why does Congress still refuse to act? The petitioner made requests through his Congressional Representative, Don Ritter, 15th Congressional District, Pennsylvania. In a letter dated February 4, 1987, Congressman Ritter addressed the matter to the Chairman of the Subcommittee, Committee on Energy & Commerce, the Hon. Congressman Edward J. Markey. My Congressional Representative's letter was well written, and to the point. (APPENDIX E). In a letter received

from my Congressman Don Ritter on June 8, 1988 (APPENDIX G), he states, "Also, once the American Board of Trade case gets out of the Courts, PERHAPS, our Subcommittee will take a look at this. As you know, I have asked the Chairman to do this, and I will keep after him."

Why did the U.S. District Court-Southern District of New York, refuse to adhere to the warning cited by the 1984 Court of Appeals, Second Circuit, in reference to "harm to investors from abrupt discontinuance of the CP program". The Court of Appeals repetitive allusions to the Supreme Court statement in Hecht Co. v Bowles, supra 321 US at 329-30, SEC v. ABT. Inc. 751 F 2d 529 2nd Cir. (1984) at 543 were also apparently overlooked.

There was a sudden reversal of the ABT operation, after all records and files were seized. There was sudden

reversal from the date (June 26th, 1986) on which the U.S. Court of Appeals issued a stay of injunction, and the date (June 30, 1986) on which a district court magistrate issued a search and seizure warrant, vitiating the purpose of the Court of Appeals stay. A "JURY OF THE PEOPLE" was not present to decide the issue of "probable cause". Toth v Quarles, 350 v. Quarles, 350 US 11, 16 (1955) AMENDMENT VII, U.S. Constituion, N. Carolina v. Foy, 2 HAY 310, 312: 5 N Car 57, 63 (1804)

REASONS FOR GRANTING WRIT

A WRIT OF CERTIORARI should be granted to -

a. review the sealed affidavit relied upon in obtaining the search warrant from the Magistrate.

b. try to determine if the SEC acted properly in regard to the June 26th stay. (Why was an action such as this timed, when Stock Market and investment situations were at an all time high)

c. .. determine if representatives of govermment acted responsibly by "withholding information" from a District Magistrate of the nature of the appeal pending before the U.S. Court of Appeals-Second Circuit, which might have led the Magistrate to condition execution of the warrant upon measures that would have

been consistent with the stay issued by the U.S. Court of Appeals granted on June 26, 1986, e.g. supplying copies of seized documents.

d. .. determine if the abuse of Fourth Amendment rights by the government constituted an illegal search and seizure of important records and documents. These documents were necessary for a final determination under consideration by the Court of Appeals-Second Circuit, namely, "the legality of the marketing of commercial paper notes", at the time when the records were seized.

e. .. determine if "protection" for the present investors was the prime intent of the SEC, when they applied for a search warrant before Magistrate Gershon.

f. .. determine if the consistency in the decision making process of the U.S.

Court of Appeals, Second Circuit, was altered by the issuance of the search warrant?

g. .. determine if seized records can be of any value to the Court after being in the custody of government agents who -

(I) lied to Judges of the U.S. Court of Appeals, when they stated for the record that "the SEC made no claim that any investor had been or had been likely to be financially hurt". SEC v ABT INC., 751 F 2d 529 (2d Cir. 1984) at 530

(II) failed to disclose to a District Court Magistrate recent ongoing proceedings in the U.S. Court of Appeals-Second Circuit, an omission of a material fact. SEC v ABT Inc. 798 F 2d 45 (2d Cir 1986) at 47

(III) failed to keep in mind a concluding statement by the U.S. Court of Appeals, a statement made by the U.S. Supreme Court,

in Hecht Co. v. Bowles, supra, 321 US at 329-30, SEC v ABT Inc. 751 F 2d 529 (2d Cir. 1984) at 543, a statement to which the Court of Appeals had alluded to more than once in the above mentioned case. (Note: This statement is quoted on pages (4), and (22).

h. .. determine if the action* taken by the U.S.District Court (Magistrate Nina Gershon and Judge Shirley Wohl Kram) was influenced in any way by the opinion of record, SEC V. ABT Inc., 751 F 2d 529 2nd Cir. (1984)

* The Magistrate issued a search warrant to the SEC on June 30, 1986. The District Court Judge issued a MEMORANDUM OPINION AND ORDER, SEC v ABT Inc. 83 Civ. 6213 (SWK), ordering the "assets of ABT Inc. to be liquidated".

The record SEC v ABT Inc. 751 F 2d 529 2nd Cir. (1984) plainly states at ...

Page 543.."the district court should have ever present in mind the Supreme Court statement in Hecht Co. v. Bowles, supra 321 US at 329 to which we previously aluded"

Page 530.."the district courts position that defendants should have made provisions long before the prospect of being forced to redeem millions of dollars worth of commercial paper on short notice, fails to take into account the SEC's long acquiescence in the program".

i. .... determine if the "hostile" attitude of the S.E.C. staff at its N.Y. Regional office was a factor in the "with-holding of information" from the

Magistrate who issued the search warrant? This hostile attitude is mentioned in SEC v ABT Inc. 751 F 2d 529 2d Cir 1984 at - Page 532: "The answers claimed that shortly after the episode, the expressed attitude on the Commission's staff at its New York Regional Office dramatically changed from one of cooperation to one of hostility"

j. .. review the little time expended, (July 17, 1986 to August 8, 1986) by the U.S. Court of Appeals-Second Circuit on the 1986 appeal, 86-6100,SEC V ABT Inc. 798 F 2d 45 (2nd Cir. 1986) compared to the time expended by the same Court (October 25th to December 26th, 1984) on the 1984 appeal (84-6240), SEC v ABT Inc.751 F 2d 529 (2d Cr. 1984).

k. .... review the quality and quantity of law cited in the 1984 (84-6280)

appeal, compared with the quality and quantity of law cited in the 1986 appeal (86-6100). The 1986 Court assumed familiarity with the 1984 appeal, as it was sequel to the 1984 case. SEC v.ABT Inc. 798 F 2d 45 (2d Cir 1986) at 46 As the law had not changed in regard to commercial paper registration from 1984 to 1986, and the issue was based upon the law in regard to commercial paper registration, WHAT DID CHANGE?

1. resolve any possible conflict of opinions of records presented pertaining to the same subject matter, namely

I. SEC. v ABT Inc. 751 F 2d 529 (2d Cir. 1984).

II. SEC v ABT Inc. 798 F 2d 45 (2d Cir 1986)

m. ... determine if the U.S. District Courts injunction issued on February 2,

1987, should be reversed. MEMORANDUM AND ORDER, 83 Civ. (SWK),USDC, SDNY(Sup.App.H) 1.... determine if the petitioner and his family, all investors in commercial paper marketed by ABT Inc., are entitled to redress for harm and damages caused by the SEC's mis-use of the Judicial Power of the United States of America?

ARGUMENT

1. The governmert has decided to protect investors in securities. In an ongoing situation, should the first priority of government (SEC) be to (a) protect those citizens who have money invested, or (b) protect those citizens who do not have money invested? Does the SEC have the same "POWER", to make such a decision, as the CONGRESS? Or to phrase the question more bluntly, "who elected the SEC to make important decisions effecting protection of the citizens of the United States, or bestowed the "POWER" upon them which is bestowed upon the CONGRESS by Article I, Section 8 of the U.S. Constitution?

2. Should American investors be punished for -

a. a hostile attitude of government agents toward a Corporate managment, over

infractions determined to be "harmless in character" by the Courts, and known to the SEC for over fourteen years?

b. the with-holding of information from a District Magistrate, by responsible Government agents, which was relevant to probable cause?

c. an apathetic Congress who failed to pass laws in regard to commercial paper registration, which are not "ambiguous" to the Courts?

d. an apathetic Congress who has passed ambiguous laws, which have PLAGUED THE COURT SYSTEM FOR DECADES?

CONCLUSION

The petitioner is of the opinion that there is one power, and one agency which is responsible for the conflicting opinions of the Court, and resultant loss to commercial paper investors, stemming from the issuance of a District Court MEMORANDUM OPINION AND ORDER, 83 CIV 6213 USDC SDNY (SWK).

The power responsible is the Congress of the United States. Congress did not conform to US Code, 15 & 77e (para. 5).....POWER OF CONGRESS

" The business of trading in securities is subject to Congressional regulation, but the regulation must be done in strict subordination to constitutional and lawful safeguards of individuals."

Archer v. SEC, C.C.A. 1943, 133 F 2d 795 certiorari denied 63 SCt. 1330, 319 U.S. 767, 87 L. Ed. 1717"

Long inattention on part of the Congress to clarify ambiguous wording in laws pertaining to the registration of

commercial paper notes under the Securities Acts of 1933 and 1934, is a second failure, and mentioned by the Court as a situation which "have plagued the Courts and persons subject to securities laws for decades."

SEC v ABT Inc. 751 F 2d 529 (2d Cir 1984) at 540

Exchange National Bank v. Touche Ross & Co. 544 F. 2d 1127, 1138 (2d Cir. 1976)

The agency responsible is the Securities and Exchange Commission. Their hostile attitude toward the American Board of Trade Inc., and its affiliates combined with the with-holding of information from a District Magistrate (which was relevant to probable cause),is a situation requiring review.

The S.E.C. failed to heed the language of the Supreme Court as framed in the record pertaining to "stay of

injunction". The S.E.C. failed to set priorities of protection in order after a plan for so doing was drawn up for them by the U.S. Court of Appeals-Second Circuit. SEC v ABT Inc. 751 F 2d 529 2nd Cir. (1984) at 543. Hecht Co. v. Bowles, supra, 321 U.S. at 329-30. The S.E.C. ultimately destroyed the plan which the U.S. Court of Appeals-Second Circuit had designed for them, a plan offering protection to 9,100 American investors.

The S.E.C. and The Congress displayed complete lack of knowledge of Fourth, Fifth, and Tenth Amendment rights guaranteed to American citizens under the U.S. Constitution, the supreme law of the land.

One question has yet to be considered. It does not take precedence over issues presented. It involves "trial by jury" for corporations, as well

as individuals. Old law is cited. I wonder, had old law been heeded, could a lot of unnecessary time and expense have been avoided?

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States"
AMENDMENT VII, U.S. Constitution

"members of a corporation...shall not be... deprived of their liberties or property, unless by a trial by jury." according to the rules of the common law"
N.Carolina v Foy, 2 HAY,310, 312: 5 N Car 57,63 (1804)

"the jury... acts not only as a safeguard against judicial excesses, but also as a barrier to legislative and executive oppression. The Supreme Court.... recognizes that the jury....is designed to protect Defendants against oppressive governmental practices"

United States ex rel Toth v Quarles, 350 US 11, 16 (1955)

Does the U.S. Constitution permit agents of government to act in a harmful manner toward citizens of the United States citizens of the United States?

"Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen"
Olmstead v. U.S., 277 US 438 485; 48 S CT L ED 944 (1928)

Respectfully submitted,

JOHN F. ROMANN, Pro Se
Box 312, R.D. #4
Easton,
Pennsylvania 18042

(215) 252-7259

Easton, Pennsylvania

July 15, 1988

APPENDIX A

SDNY
83-CV-6213
KRAM

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the U.S. Courthouse in the City of New York on the 23rd Day of October, one thousand nine hundred and eighty-seven.

PRESENT:

HONORABLE GEORGE C. PRATT,

HONORABLE FRANK X. ALTIMARI, Circuit Judges

HONORABLE FRANK A. KAUFMAN, District Judge
U. S. District Court for the
District of Maryland, sitting
by designation)

THE SECURITIES AND EXCHANGE COMMISSION
Plaintiff-Appellee,

-against-

THE AMERICAN BOARD OF TRADE, INC., ARTHUR N. ECONOMOU, PHYLLIS H. ECONOMOU, and THE AMERICAN BOARD OF TRADE

Defendants

JAMES C. LIN, FRIEDA GARCIA, RUEL GARCIA, GLENN GARCIA, WALLIE BING, A.N. SHAN, KARIN DIETZ, JOHN R. HURLEY, BETHEL A.M.E. CHURCH, KATHLEEN BEESLEY, JOYCE C. DONNELLY, FRANK J. DONNELLY, JOHN G. ROMANN, JOHN P. MONAHAN, JAMES A RINEHART, ALEXANDER J. PALYO, PHILIP J. DWORNIK, GORDON A. ATWATER, ELLEN L. ATWATER,JOHN D. ATWATER, CYRIL M. BEZKORAWAJNY,MARTIN W. SULLIVAN JR, ANTHONY GALIOTO, JOSEPH A. GUERIN, RUSSEL C. ADAMS, LILAS SCHMIDT, GERTRUDE HEULER, JACQUELIN RUDY, PATRICIAL J. MURPHY, LAWRENCE J. GAY, and THOMAS ZIMMERMAN

Appellants

Nos. 87-6089,6071,6077,6081, 6082,6090,6091,6092

This appeal from an order of the U.S. District Court for the Southern District of New York, Shirley Wohl Kram, Judge, came on to be heard on the transcript of the record and was argued.

ON CONSIDERATION WHEREOF, it is now ordered that the order appealed from be

and hereby is affirmed substantially for the reasons set forth in the special master's report and the confirming memorandum and order of the district court.

The Securities and Exchange Commission (SEC) commenced this enforcement proceeding in 1983 to enjoin the sale to the public by the American Board of Trade, Inc. (ABT), of interests in treasury bills and commercial paper, in alleged violation of the Securities Act of 1933, the Securities and Exchange Act of 1934, the Investment Company Act, and SEC Rule 10(b)-5. On July 31, 1986 the district court appointed a special master for the purpose of, inter alia, determining the assets and liabilities of the ABT commercial paper program, with a view toward winding up that program and distributing its assets to the holder of

notes in the ABT commercial paper program. On February 2, 1987, the United States District Court for the Southern District of New York (Kram, J.) issued an order, based on a report and recommendation made by the special master, which directed that, in distributing the assets of the ABT entities, ABT's treasury bill customers should be entitled to the return of their investments in full and ABT's spot commodities customers should be entitled to the return of the specific and identifiable properties held in their names.

The special master reported that ABT had established itself as trustee for the treasury bill customers. They had purchased treasury bills by sending a certified check, money order, or bank draft to ABT along with a signed

application form, and ABT purchased and held specific treasury bills for identified customers until maturity. Similarly, ABT had also established itself as a trustee for the owners of identifiable commodities. Because, in the case of both commodities owners and treasury bill holders, ABT was a trustee and there is an ascertainable res of the trust, the doctrine of "trust pursuit" applies, and these investors are entitled to priority. Independent Coal & Coke Co. v. United States, 274 U.S. 640, 647 (1927); see generally 76 Am. Jur. 2d Trusts && 251-258 (1975)

The special master did not expressly determine whether ABT was a trustee for investors in reserve funds of ABT's spot commodities and forward markets or for investors in commercial paper. However, because the reserve funds and commercial

paper accounts were not segregated, but instead were deposited into ABT's general accounts and used by ABT in the ordinary course of business, there is no ascertainable res even if the other elements of a trust relationship were present. With no identifiable trust property, the investors in reserve funds and commercial paper are left as unsecured creditors with no priority.

George C. Pratt, U.S.C.J.
Frank X. Altimari, U.S.C.J.
Frank A. Kaufman, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

"Filed Oct. 23, 1987, Elaine B. Goldsmith, Clerk, U.S. Court of Appeals-Second Circuit"

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the U.S.Court of Appeals-Second Circuit, held at the U.S. Courthouse, in the City of New York, on the 25th day of April, one thousand nine hundred and eighty-eight.

S.E.C.

v.

AM BD OF TRADE ET. AL,

Docket No. 87-6081, 87-6069 (L)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant pro se

JOHN F. ROMANN

Upon consideration by the panel that

heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith, Clerk

"Filed April 25, 1988, Elaine B. Goldsmith, Clerk, U.S. Court of Appeals-Second Circuit"

APPENDIX C

SDNY,6213-KRAM

U.S. COURT OF APPEALS-SECOND CIRCUIT

PRESENT: HONORABLE GEORGE C. PRATT,
HONORABLE FRANK X. ALTIMARI
Circuit Judges
HONORABLE FRANK A. KAUFMAN,
District Judge (U.S.D.C.for
the District of Maryland,
sitting by designation)

Nos. 87-

6089,6071,6077,6081,6082,6090,6091,6092

THE SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

-against-

THE AMERICAN BOARD OF TRADE, INC., ARTHUR N.ECONOMOU,PHYLLIS H. ECONOMOU, and THE AMERICAN BOARD OF TRADE

Defendants

JAMES C. LIN, BETHEL A.M.E. CHURCH, JOHN G.ROMANN, and twenty nine "John Does"ending with THOMAS ZIMMERMAN, as listed in APPENDIX A.

Appellants.

"ISSUED AS MANDATE: May 3, 1988
Filed October 23, 1987,Elaine B. Goldsmith,Clerk, U.S.Court of Appeals-Second Circuit

APPENDIX D

U.S. SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

HO-48912

September 25, 1986

Mr. John F. Romann
Box 312, R.D. #4
Easton, PA. 18042

Re: American Board of Trade, Inc.

Dear Investor:

This is in response to your letter addressed to President Reagan concerning the American Board of Trade, Inc. ("ABT").

On September 30, 1983, the Commission brought a legal action against ABT and certain of its affiliates ("ABT companies") and controlling persons alleging, among other things, illegal sales of unregistered securities, in the form of short-term unsecured notes (which defendants call "commercial paper"),

issued by the American Board of Trade Service Corp. ("ABT Service"), a wholly owned subsidiary of ABT. This litigation entitled Securities and Exchange Commission v. The American Board of Trade, Inc. et. al, 83 Civ. 6213 (SWK) S.D.N.Y., is currently before the United States District Court for the Southern District of New York.

Based on partial financial data disclosed by the defendants, the Commission informed the district court on May 20, 1986 that ABT Service appeared to be grossly insolvent by at least $35 million and perhaps more, and was becoming increasingly insolvent as note sales continued, with consequent harm to existing noteholders. At the Commission's request, the district court enjoined further sales and stayed all redemptions of notes, pending an examination by a

court-appointed Master of the ABT companies' financial condition, and a recommendation of a plan of distribution to the noteholders. On August 8, 1986, the Court of Appeals for the Second Circuit affirmed that order.

On July 29, 1986 the district court appointed Milton Gould, Esquire, as Master. Mr. Gould has retained the accounting firm of Coopers & Lybrand to examine the ABT companies' books and records, and at present is directed to report to the court by October 1, 1986, although the deadline may be extended. It cannot be predicted at the present time when the Master will make his report or what he will recommend.

On September 2, 1986, at the Commission's request, and based in part on the court's concern about dissipation of the ABT companies' assets, the

district court appointed Mr. Gould as interim receiver for the ABT companies, with instructions to continue the functions he was carrying out as Master, but also to take possession and control of the assets of the companies. The court has stated that it will appoint a permanent receiver for the companies.

Investors who hold notes issued by ABT may wish to discuss their rights and those avenues of recourse available to them with a private attorney. We appreciate the opportunity to review your correspondence.

Sincerely,

Cecelia A. Charles
Acting Director

APPENDIX E

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C.

February 4, 1987

The Honorable Edward J. Markey,M.C.
Chairman, Telecommunications & Finance Subcommittee
Committee on Energy & Commerce
B331 Rayburn Building
Washington, D.C. 20515

Dear Ed:

Congratulations on your election as Subcommittee Chairman. I look forward to working with you in the 100th Congress.

A constituent is personally and deeply involved in the litigation concerning the American Board of Trade (ABT) and has submitted questions for the Subcommittee's consideration. He points out that after an excellent and equitable dissertation by Judge Friendly (who allowed ABT to wind down after periodic examinations) Friendly's last stay order

issued on June 26, 1987, raised the following questions:

"Why did the U.S. District Court, Southern District of New York, grant an order to the SEC, the U.S. Attorney, and the Post Office which stopped the entire operation on July 1, 1986----

a) "since it was being monitored by the U.S. Court of Appeals, Second District?

b) "since it would result in harm and punishment for vioations which the higher court labeled as "essentially harmless in character" as recorded in the August Term, 1984 Bulletin No. 462?

c) "since it would result in the loss of $80 million to 9,100 citizens?

d) "since it would destroy the essence of equity jurisdiction which has been the power of a Chancellor?, and,

"why did the same higher Court, the U.S. Court of Appeals, Second Circuit,

New York, then reverse the "framing of their order' as stated in Bulletin No. 462, and appoint a Special Master and Interim Receiver?

Ed, I know the Subcommittee looked into this case and the answers may be readily available. Please give me the benefit of your thinking at your earliest convenience. Also, for my own information, does the Subcommittee plan to hold any hearings on this matter in the near future?

With best wishes,

Sincerely,
DON RITTER

DLC:jc

Member of Congress

APPENDIX F

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

April 2, 1987

Mr. John F. Romann
Box 312, R.D. #4
Easton,PA. 18042

Dear John:

Please be advised of the following information, per your request, obtained over the telephone by my caseworker, Lynne, during the week of March 16, 1987.

1. The warrant issued by the U.S. District Court, Southern District, New York, document #939, was returned and sealed, July 1986. The warrant cannot be opened until the investigation is completed.

2. The list of Commercial Paper holders,docket #83 Civ. 6213 (SWK), document #240, is also not available until the investigation is completed.

The case is currently with the Court of Appeals.

We will continue to keep in touch on this matter. In the meantime, should you have any additional questions or if you receive any other information on this matter, please contact my caseworker, Carol. I welcome the opportunity to be of service.

With kindest regards, I am

Sincerely,
DON RITTER

Member of Congress

DR:lj

APPENDIX G

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

June 8, 1988

Mr. John F. Romann
Box 312, R.D. #4
Easton, PA. 18042

Dear John:

Thanks much for your recent letter and the enclosed flyer. I also appreciated your comments on the matter of the American Board of Trade v. SEC and your desire to file your own claim form. I am sure you can understand the wisdom behind the claim policy. If a physician receives the payment, he must file the claim. In this way officials can trace any fraudulent practices by physicians.

I am sure you would want it this way. This does not mean you cannot assist your physician in making the claim. In a sense, you are submitting the claim, but

since he signs it, , must accept the responsibility.

Also, once the American Board of Trade case gets out of the courts, perhaps our Subcommittee will take a look at this. As you know, I have asked the Chairman to do this and I will keep after him.

Sincerely,

DON RITTER
Member of Congress

DLR:jc

88-165

Supreme Court, U.S.
FILED
JUL 19 1988
JOSEPH E. SPANIOL, JR.
CLERK

SUPPLEMENTAL APPENDIX

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

JOHN F. ROMANN

Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION

- and -

THE AMERICAN BOARD OF TRADE INC., et al

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OPF CERTIORARI

John F. Romann, Pro se
Box 312, R.D. #4
Easton, PA. 18042

(215) 252-7259

SUPPLEMENTAL APPENDIX

Appendix H — Copy of Memorandum Opinion & Order, 83 Civ 213 (SWK), February 2, 1987.

Appendix I — Copy of letter from Special Master & Interim Receiver addressed to ALL CUSTOMERS AND CREDITORS OF ABT INC. and ITS RELATED ENTITIES, dated February 13, 1987, with enclosures at end (1) 28 & 1292 and (2) Rule 5, Appeals by Permission Under 28 USC 7 1292.

Appendix J — Copy of timely filed Notice of Appeal in USDC, SDNY, dated March 4, 1987.

Appendix K — Copy of Filing Fee Receipt, USDC, SDNY

Appendix L — Copy of letter from Pro Se Office, USDC, SDNY, concerning papers and filing fee.

Appendix M — Copy of letter from U.S. Court of Appeals-Second Circuit, dated March 18, 1987, confirming filing for appeal on March 4, 1987; Copy of Memorandum from U.S. Court of Appeals-Second Circuit, VOIDING letter of March 18, 1987, and ordering that Notice of Appeal is being construed as a motion under FRAP Rule 1292(b)

SUPPLEMENTAL APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SECURITIES AND EXCHANGE COMMISSION
Plaintiff,

- against -

THE AMERICAN BOARD OF TRADE, INC., ARTHUR N. ECONOMOU, PHYLLIS H. ECONOMOU, and the AMERICAN BOARD OF TRADE,
Defendants.

83 Civ. 6213 (SWK)

MEMORANDUM OPINION AND ORDER

APPEARANCES:

ARTHUR N. ECONOMOU, Pro Se
9 South William Street
New York, New York

THE SECURITIES AND exchange COMMISSION
26 Federal Plaza
New York, New York 10278
By: CHARLES PADGETT

MILTON GOULD,
Interim Receiver
330 Madison Avenue
New York, New York

SHIRLEY WOHL KRAM, U.S.D.J.

Pursuant to this Court's order of July 31, 1986 appointing Milton S. Gould, Esq. Special Master, Mr. Gould submitted his report and recommendations (the "Report") to the Court on November 5, 1986. The key finding in the Report, which is annexed (to the original) as Appendix A, is that the American Board of Trade ("ABT") has aggregate liabilities of approximately $79 million against which it holds approximately $30 million in assets. This liability, combined with ABT's inability to generate income due to the injunction on its commercial paper program, led the Special Master to recommend that ABT be dissolved and liquidated. The Court agrees that ABT should be liquidated pursuant to the recommendations set forth in the Report.

Immediately after the Special Master filed the Report, the Court authorized

him to mail a summary of the Report to all commercial paper holders (the "paper holders"). This summary included instructions for obtaining copies of the Report, informed paper holders that the Court's deadline for filing objections to the Report was January 5, 1987, and advised that the Court would hold a public hearing at which individuals could comment on the Report on January 19, 1987. The Court received nearly 200 written objections, and approximately 60 persons attended the hearing.

The objections bear eloquent witness to the destruction that ABT has wrought upon the lives of thousands of investors, including individuals who have invested their life savings, elderly persons in need of their money for medical care, and couples saving for their retirement or for their childrens' education. Each

expressed anguish and disbelief at facing the loss of hard-earned and carefully-saved monies. The Court is sympathetic to each of the investors and regrets that they are now bearing the brunt of ABT's unlawful activities. The Court intends to do everything in its power to ensure as full a return on each investment as possible. However, the status of defendants' business--------an unlawful commercial paper operation nearly $50 million in debt--provides the Court with limited options.

The objections fall into a number of categories which the Court discusses below.

A. THE DISSIPATION OF ABT'S ASSETS

A number of paper holders do not understand how ABT became so deeply in debt and ask for a full accounting of how

its funds were used. While it is impossible, given the incomplete financial records ABT maintained,to trace each lost dollar, some conclusions are possible.

1. The Structure and operation of ABT

ABT is composed of 34 related companies. Ten of these companies are operational, fourteen are capitalized but dormant, and ten are uncapitalized and dormant. These companies form what defendant Arthur N. Economou calls the ABT National Market System, which is purportedly a national exchange and market place system. In reality, the majority of the National Market System's corporations are shells which produce no income but incur expenses. The vast amount of ABT's income was derived from its commercial paper program, and this income was used to help establish and pay

the expenses not merely of the commercial paper program, but of the entire National Market System as well.

2. Shortfall in Investments

In recent years, ABT offered commercial paper at a much greater discount than it earned on its own investments. For example, at one point ABT invested all its money in Certificates of Deposit paying an average of 6.3 percent interest, and it offered its commercial paper at a discount rate of 10 percent.

3. Loans to Arthur and Phyllis Economou

The Special Master reports that ABT's records reveal outstanding loans to the Economous in the amount of $521,090.00. The loans are interest free, and no terms have been discovered. The Economous claim that these loans are

offset by nearly $1 million that ABT owes them in commissions. However, no documents or agreements have been found to support this claim. The Court has ordered the Special Master to investigate the Economous' liability to ABT, and the Court has frozen up to $500,000 of the Economous' assets pending a final determination of the issue. The Court has ordered the Special Master to investigate the Economous' personal assets. The Economous' sworn testimony indicates they have much less than $500,000 in assets, and all other efforts at locating other assets---including incarcerating Arthur Economou for refusal to discuss his personal assets---have been unsuccessful.

4. Criminal and Civil Contempt of Arthur Economou

On October 8, 1986, this Court held Arthur Economou in criminal and civil

contempt because he redeemed $175,000 in commercial paper after July 18, 1986, in violation of the Court's order prohibiting him from doing so. The Court ordered Economou to repay the $175,000 to ABT. Thus far, Economou has repaid approximately $35,000 which he claims exhausts all of his assets. The Special Master is continuing his investigation of Economou's personal assets in an attempt to recoup the $140,000 balance.

5. Other Legal Proceedings Against ABT

In an entirely separate action from this one, the Commodities Futures Trading Commission ("CFTC") sued the ABT for commodities laws violations. In that case, the judge ordered ABT to disgorge $126,706 to make whole persons who lost money through ABT's commodity options programs, $31,074.26 to pay the trustee in the case and $179,183 to pay the

accountants. A fund in the amount of $336,936.26 was created to cover this judgment. The Special Master recommends that the trustee in the CFTC proceeding be treated as a judgment creditor, entitled to no higher priority than ABT's unsecured creditors and customers. The Court feels that the CFTC litigation raises a number of issues which still need consideration. The fund should remain intact pending resolution of those issues, and should not be distributed, at this point, with the rest of ABT's assets.

B. ALLOWING ABT TO CONTINUE OPERATIONS

Arthur Economou suggests that he be allowed to sell ABT as a going concern, which would apparently include the commercial paper business. Alternatively, he suggests that even if

the commercial paper program cannot operate, ABT should be allowed to gradually rebuild itself using its other businesses and eventually become a viable organization once again. A number of paper holders also stated that ABT has had a perfect service record for a number of years, and should be allowed to continue to operate.

Three problems confront any plan to rehabilitate ABT. First, ABT is enjoined from issuing commercial paper because it does not have sufficient financial records to register the paper with the SEC. In the absence of its commercial paper program, ABT has no substantial source of income. Second, ABT has generated net losses exceeding $28 million from 1980 through 1984 and incurred losses of approximately $17.5 million in 1985 and 1986. Third, ABT is

indebted in the amount of nearly $50 million. With no source of income, high operating losses, and heavy debts, ABT is no longer a viable operation, and could not be sold.

Many paper holders also suggest that ABT is not insolvent, as it is not uncommon for financial institutions not to have enough assets on hand to cover all liabilities. ABT, however, does not have any significant sources of income, and thus, there is no possibility that it could meet its liabilities. The status of other institutions is irrelevant to this case.

C. THE BEHAVIOR OF THE SEC

Many paper holders criticized the Securities and Exchange Commission ("the S.E.C") for allowing ABT to sell unregistered commercial paper for 14 years before attempting to enjoin the

sales in 1983. They argue that since the SEC allowed ABT to issued unregistered commercial paper for so long, ABT should be allowed to continue to issue unregistered commercial paper. This would supposedly protect investors and alleviate harm and suffering.

The SEC's alleged delay in bringing this case does not change the law that requires commercial paper to be registered. Even if equity somehow dictated that ABT be allowed to issue unregistered paper, the records of ABT indicate that it has been redeeming outstanding commercial paper with money it receives from new investors and rollovers. Given ABT's recent operating losses, its increasing liabilities, and its legal problems, ABT's customers would be unlikely to rollover their paper, and ABT could attract few new

investors. It would not be long before ABT's assets were drained and all remaining commercial paper holders were left "holding the Bag". Liquidating ABT now guarantees as equitable as possible a return to allpaper holders.

D. PRIORITY FOR TREASURY BILL AND SPOT COMMODITY HOLDERS

As part of its business, ABT purchased Treasury Bills ("T-Bills") and commodities for its customers. T-Bills and commodities purchased through these programs represent $1,525,000 and $916,901 of ABT's assets, respectively. The Special Master concludes that T-Bill holders have a priority claim for the value of their investment, and that spot commodities holders have a priority claim for the specific and identifiable items held in their names. The Special Master recommends, however, that if the Court orders priority distributions, the order

be certified for appeal pursuant to 28 U.S.C. & 1292(b). Many commercial paper holders objected to priority status for T-Bill and commodities holders. The following factual findings and legal conclusions are based on the Special Master's report and the Court adopts them.

The purchase of T-Bills by ABT is made upon the customer's remittance to ABT in New York of the appropriate funds by certified check, money order or bank draft and a signed application form. Funds so received are deposited into a checking account maintained by ABT at Marine Bank, N.A. in Milwaukee, Wisconsin. This account is used exclusively for the T-Bill program.

Both the original application form and "safekeeping receipts' sent to customers after their T-Bills are

purchased state that ABT is acting as agent for their T-Bill customers and that the T-Bills are being held for safekeeping. Each T-Bill customer is assigned a separate account number.

Marine Bank, N.A. sells T-Bills to ABT's accounts pursuant to orders placed by ABT each Monday morning. Simultaneously, Marine receives reinvestment instructions from ABT for maturing T-Bills. ABT's checking account is debited in the corresponding amounts and T-Bills purchased are held by Marine in the name of "American Board of Trade, Inc., as nominee for others".

ABT sends a confirmation letter to Marine Bank stating the names and addresses of persons who own the T-Bills as well as their individual account numbers and terms of purchase.

Three weeks prior to maturity of

the T-Bills, a Maturity Notice is sent by Marine to ABT, indicating the date of maturity and amount of maturing T-Bills. Notification is then sent by ABT to their T-Bill customers indicating that their T-Bill is about to mature. The T-Bill customer is given the option to receive full remittance or reinvest the value of his or her T-Bill.

Proceeds from matured T-Bills are automatically credited to the checking account of ABT by Marine. This account is used by ABT to pay customers who have chosen to redeem their matured T-Bills and to purchase new T-Bills.

Through the operation of its T-Bill program, ABT has established itself as either a trustee, an agent, or an agent-trustee. All three are fiduciaries with a duty to act for the benefit of another. The existence of an agency does not

preclude the finding of a trust and where both are present the fiduciary is an "agent-trustee". Restatement (Second) of Agency §14 B comment a (1977).

Three elements are required to establish an agency. First, there must be a manifestation by the principal that the agent shall act for Him. Second, the agent must accept the undertaking. Lastly, there must be an understanding between the parties that the principal is to be in control of the undertaking. Restatement (Second) of Agency §1 comment b (1977); AHN v. Rooney, Pace Inc. 624 F Supp. 368 (S.D.N.Y. 1985). Control by the principal is essential -- without it there will be no agency. AHN, 624 F. Supp. at 370. 1/

Similar elements exist in a trust relationship. These include: (i) a settlor with legal competence to make a

disposition of legal title to his property; (ii) an ascertainable trust res; (iii) a beneficiary; (iv) a present and complete disposition of the trust res; and (v) an unequivocal intention by the settlor to create a trust. See generally, 76 Am. Jur. 2d Trusts &1, et seq. (1975)

The distinction between a trustee and agent lies in the element of control and the extent of disposition of the property. A party who merely has possession of property of another and, although authorized to deal with that property, is subject to control by its owner, is an agent of the owner. A trustee, however, holds a legal or equitable title to the property placed in his possession and may or may not be subject to the beneficiary's control. An agent-trustee is one who holds a title

but is also subject to control by the benificiary. Restatement (Second)Agency & 14B and comments a-c (1977)

ABT, in transacting with its T-Bill customers, appears to be acting more like a trustee than an agent. Although the original agreement addresses ABT as "agents", the use of that language is not dispositive and must be weighed in light of all the circumstances.

The main element for creation of an agency, that of control, is lacking. The T-Bill customers maintain little, if any, control over ABT and the way it handles their accounts. There was nothing in the agreement providing for where or how ABT was to hold the T-Bills other than that the T-Bills were to be held by ABT for "safekeeping". Beyond the original agreement, the confirmation and the notice of maturity, there was no other

regular correspondence between the parties over the course of three to six years. It is doubtful that the T-Bill customers were even aware of where their securities were being held.

Conversely, assuming that the T-Bill customers were legally competent, all of the elements necessary to create an express trust are present. The funds and T-Bills in the safekeeping account represent an ascertainable trust res. The T-Bill customers made a present and complete disposition of the res upon remittance of a certified check, money order, or bank draft made payable to ABT. There was an unequivocal intention by the T-Bill customers to create a trust manifested by the language on the signed agreement.

Additionally, ABT, by acknowledging that they were holding the securities for

their T-Bill customers to be returned upon maturity, established the creation of an express trust. Millbank v. Jones, 127 N.Y. 370, 374 (1891).

It is clear that where, as here, money is delivered by one person to another to be held for a certain purpose, an express trust is created. McKee v. Lamon, 159 U.S. 317, 324 (1895)

Under the rule of "trust pursuit", a trust will follow property through all changes as long as such property or its proceeds are identifiable. Independent Coal & Coke Co. v. United States, 274 U. 640, 647 (1927) See generally, 76 Am. Jr. 2d Trusts &&251-258(1975). It is unnecessary to conclude that a trust relationship was originally established for this rule to apply because funds or property coming into the hands of an agent are also held in trust by the agent

for the principal. State Dept. of Agriculture v. Tillamook Cheese and Dairy Association, 251 Ore. 393 (1968), Thus,

"(W)here money or property is entrusted to (an) agent for a particular purpose, it is impressed by law with a trust in favor of the principal until it has been devoted to such purpose; and if it is wrongfully diverted by the agent, such trust follows the fund or property...so long as it can be identified..."

Air Traffic Conference v. Downtown Travel Center, Inc., 87 Misc. 2d 151, 154, 383 N.Y.S. 2d 805, 806-807 (N.Y. Sup.Ct.N.Y. Co. 1976). Even if the fund is placed in the trustee's general account, the trustee does not become a mere debtor of the settlor. Id. at 806. The same is true of an agent who deposits funds of his principal in an account in the agent's name---the funds remain that of the principal and are not subject to claims of the agent's creditors. Kinnison v.

Guaranty Liquidating Corp., 18 Cal. 2d 256 (1941).

Additionally, New York E.P.T.L. & 11-1.9 gives fiduciaries express (although somewhat limited) authority to commingle securities from different trusts, recognizing that the merged securities do not lose their identity as individual trust res. See also In re Will of Coe, 80 Misc. 2d 374, 363, N.Y.S. 2d 265 (N.Y. Surr. Ct. Nassau Co. 1975).

By placing the T-Bills in a safekeeping account which it held as "nominee for others", ABT did not destroy the trustee/settlor relationship it had with its customers. Likewise, the T-Bills remained intact as the identifiable trust res, so that the trust "followed" the funds and the T-Bills into the safekeeping account.

ABT's T-Bill customers maintain

their priority status over general unsecured creditors of ABT, despite the appointment of a receiver.

The purpose of a receivership is to place the property in litigation under control of the court so that it may be maintained and held for distribution pending final adjudication of the rights of the parties. 66 A. Jur. 2d Receivers &248 (1975). Generally, it is the duty of a receiver to preserve existing priorities among the claims, interests, and liens for such distribution. Id at 251. A receiver should not pay or discharge any corporate obligations except as he is directed by the court. Woodrull v. Erie R. Co., 93 N.Y. 609 (1883). see generally, 4 White, White on New York Corporations, &&1201-1218, (13th ed. 1985).

It is recognized, both in case law

and by statute, that a trust priority survives the appointment of a receiver to the trustee/company. See e.g., N.Y. Bus. Corp. L. &1210 (McKinney 1986) and Van Dyck v. McQuade 86 N.Y. 38 (1881).

For example, where a bank declared a dividend for its shareholders, the court, in an action brought on by the bank's receiver, held that from the moment it is declared, the dividend is trust property of the shareholder. Van Dyck v. McQuade, 86 N.Y. 38 (1881)

"(A)lthough the company was insolvent..money appropriated and set apart for distribution among the stockholders by way of dividend became a trust in the hands of the corporation, to which the stockholders as individuals had acquired vested rights, and they consequently were entitled to the fund in preference to the creditors of the corporation".
Id at 52.

Likewise, in a receivership governed by Article 12 of the New York Business Corporations Law, debts owing by the

corporation as trustee are paid well ahead of general creditors of the corporation. N.Y. Bus. Corp. Law & 1210 (McKinney 1986).

As to its commodities business, ABT sold commodities contracts to its customers and arranged for the safekeeping of customers' commodities at various repositories around the country. Applying the same analysis to the commodities program, the commodities customers also appear to be entitled to priority distribution.

Based on the above, the Court orders that the T-Bill holders and commodities holders with identifiable property be given priority status in the distribution of ABT's assets. The Court, however, certifies this order for interlocutory appeal pursuant to 28 U.S.C. &1292 (b). The issue of priority is purely legal as

there is no dispute as to the underlying facts. While the authorities the Court has relied on are still good law, they are generally old, and may not reflect current equitable notions. Certification will also materially advance the determination of this litigation. If an interlocutory appeal were not granted and ABT were liquidated in accord with this order, commercial paper holders would effectively be barred from challenging the priority distribution, as the money would already be distributed.

E. RESERVE ACCOUNTS AND FORWARD COMMODITIES PROGRAM

A number of individuals informed the Court that they hold cash in general reserve accounts and reserve accounts affiliated with ABT's spot and forward markets and supervised basket programs. They request priority status in the distribution of this money. The Special

Master's analysis of ABT's handling of the funds revealed that all of these monies were deposited into ABT's general accounts and were used by ABT in the ordinary course of its business. There was no segregation of funds which was held in reserve" nor do the application forms create any basis for establishing a trust relationship. These obligations would constitute general unsecured obligations of ABT and, therefore, should not be given any special treatment. The Court thus orders that these cash participants be treated as such. Since this order is based on a legal issue, and the same equitable considerations as with the priority distribution apply, the Court certifies this portion of its order to the Court of Appeals along with its order pertaining to Treasury Bill and spot commodities distribution. (SA H-20)

F. FUND FOR ADMINISTRATIVE EXPENSES AND THE SPECIAL MASTER'S RATE OF PAY

Many paper holders objected to the Master's recommendation that $1 million be set aside for administrative expenses in the belief that it is earmarked for payment to the Master. The purpose of the fund is to ensure that money is available to pay personnel to distribute ABT's assets. Any funds left in the fund will be distributed to noteholders. This fund will allow an orderly distribution of funds and the Court approves it. As to the Special Master's rate, $200. per hour is significantly below his usual rate, and the Court believes it is reasonable.

G. PRIORITY STATUS TO SPECIAL INTEREST GROUPS

Many paper holders requested that priority status be given to various

special interest groups, such as senior citizens, minors, church and charitable groups, and pension funds. Each of these requests demonstrated the grave destruction sown by the American Board of Trade's operations. Nevertheless, there is no legal authority justifying the priority treatment of those groups.

H. OUTSTANDING PURCHASE ORDERS

A number of individuals indicated that they ordered commercial paper in July 1986, sent ABT checks which ABT cashed, and never received their commercial paper. The Special Master recommends that these claims be dealt with on an individualized basis, and the Court agrees. The appropriate time to deal with the issues raised by these individuals is as individual claims are received.

The Court has considered all the

other objections to the Special Master's Report and finds them to be without merit. The Court thus adopts the Special Master's recommendations in full, except as they relate to the payment of the CFTC claims, which the Court requests the Special Master to investigate further. The Court orders that the Special Master is reappointed as Receiver of the ABT entities with the powers and responsibilities described in the Court's orders of September 2, 1986 and September 26, 1986. The Receiver shall notify all customers and creditors of ABT that they must file a statement of their claim with the Court by April 1, 1987.

SO ORDERED.

Dated: New York, New York
February 2, 1987

SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

ENDNOTE:

1. The application of New York law is appropriate because the transactions were carried out in ABT's New York office.

SUPPLEMENTAL APPENDIX I

SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 370 8000

February 13, 1987

To All Customers and Creditors
of The American Board of Trade,
Inc. and Its Related Entities:

By Memorandum Opinion and Order dated February 2, 1987 (the "Order"), U.S. District Judge Shirley Wohl Kram ruled on the recommendations contained in my report to the Court dated November 5, 1986 (the "Report"). Because of its importance to you, a complete copy of the Court's Order is enclosed herewith.

A. Summary of Rulings

In summary, the Court found that "(w)ith no source of income, high operating losses, and heavy debts, ABT is no longer a viable operation, and could not be sold" as a going concern (Order at

7). Accordingly, the Court ruled "that ABT should be liquidated pursuant to the recommendations set forth in the Report" (Order at 2).

The Court held that, in accordance with the trust principles set forth in the Report, Treasury bill customers are entitled to the return of their investments in full, and that spot commodities customers are entitled to the return of the specific and identifiable property held in their names (Order at 8).

The Court found that no other customers or creditors of the American Board of Trade, Inc., or its related entities (the "ABT Entities") are entitled to priority. Therefore, all customers and creditors other than Treasury bill and spot commodity owners shall be treated as general unsecured

creditors of the ABT Entities and shall be entitled to receive their pro rata share of the remaining assets of the ABT Entities, after the payment of administrative expenses.

B. Certification Under Section 1292(b)

In accordance with the recommendation made by the undersigned at the January 19, 1987 hearing before the Court, the Court has certified for interlocutory appeal under 28 U.S.C. &1292(b) the issue of whether, as a matter of law, ABT's Treasury bill and spot commodity customers are entitled to priority status as described above. Section 1292(b) (a copy of which is enclosed herewith) permits applications for permission to appeal to be filed from orders, such as the one involved in this case, which are otherwise not then appealable but which "involve ( ) a

controlling question of law as to which there is substantial ground for difference of opinion," and where "an immediate appeal from the order may materially advance the ultimate termination of the litigation".

Any person who believes that he or she is aggrieved by the rulings in the Order relating to priority treatment of Treasury bill and spot commodities customers may petition the U.S. Court of Appeals for the Second Circuit for permission to appeal. The procedure for making such a petition is set forth in Rule 5 of the Federal Rules of Appellate Procedure (F.R.A.P.), a copy of which is also enclosed.

Please note that petitions for permission to appeal pursuant to 28 U.S.C.&1292(b) must be filed with the Clerk of the Court of Appeals, U.S.

Courthouse, Foley Square, New York, New York 10007, within ten days after the entry of the Order appealed from in the District Court. In this case, Judge Kram has agreed to stay certification until ten days after the undersigned has advised the Court that all ABT customers and creditors have been mailed a copy of the Order. It is anticipated that the Court will be so advised on February 17, 1987. Therefore, in order to comply with F.R.A.P. 5, any and all petitions must be filed on or before March 9, 1987.

Should you have any questions concerning the deadline for filing petitions for permission to appeal from the Order, you may confirm that date by telephoning ABT at (212) 943-0100 on or after February 17.

C. The Bar Date and Submission of Claims Against ABT

In its Order, the Court has

established April 1, 1987 as the "bar date"--the last date on which any customer or creditor may file a claim against the ABT Entities. Enclosed you will find a Claim Form. If you wish to assert a Claim against the ABT Entities, please complete the form carefully, following the instructions on the form. Then mail the form and any documentation required therein to the following address: Milton S Gould, Esq.
The American Board of Trade, Inc.
9 South William Street
New York, New York 10004

All claims must be received on or before April 1, 1987 in order to be recognized. All persons who have previously written to us asserting a claim against ABT are required to follow the instructions on the Claim Form. Only claims submitted on Claim Forms will be considered.

Once the claims received have been reviewed and verified, we will proceed to

make distribution to the customers and creditors on a pro rata basis in accordance with the Court's Order. It is anticipated that, barring any delays, an initial distribution of funds will occur during May 1987. A final distribution will not be made until all of the ABT Entities' assets have been completely realized and all claims have been resolved. Please be advised that in the event any party appeals from the Order, it is possible that the Court of Appeals may stay the liquidation and distribution of the ABT Entities' assets. This would, of course, alter the timetable set forth herein.

Very truly yours,

Milton S. Gould
Special Master and
Interim Receiver

Enclosures

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order. Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

RULE 5. Appeals by Permission Under 28 U.S.C. &1292(b)

(a) Petition for Permission to Appeal.

An appeal from an interlocutory order containing the statement prescribed by 28 U.S.C. &1292 (b) may be sought by filing a petition for permission to appeal with the clerk of the court of appeals within 10 days after the entry of such order in the district court with proof of service on all other parties to the action in the district court. An order may be amended to include the prescribed statement at any time, and permission to appeal may be

sought within 10 days after entry of the order as amended.

b. Content of Petition: Answer. The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court; a statement of the question itself; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question and why an immediate appeal may materially advance the termination of the litigation. The petition shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. With 7 days after service of the petition an adverse party may file an answer in opposition. The application and answer shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers: Number of Copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished.

(d) Grant of Permission: Cost Bond: Filing of Record.

Within 10 days after the entry of an order granting permission to appeal the appellant shall (1) pay to the clerk of the district court the fees established by statute and the docket fee prescribed by the Judicial Conference of the United States and (2) file a bond for costs if

required pursuant to Rule 7. The clerk of the district court shall notify the clerk of the court of appeals of the payment of the fees. Upon receipt of such notice the clerk of the court of the court of appeals shall enter the appeal upon the docket. The record shall be transmitted and filed in accordance with Rules 11 and 12(b). A notice of appeal need not be filed.

(As amended Apr. 30, 1979, eff. Aug.1,1979)

SUPPLEMENTAL APPENDIX J

Pro Se Office
United States District Court
Southern District New York
Office of the Clerk
U.S. Courthouse
Foley Square, New York, NY 1007

Raymond F. Burghardt, Clerk

Appeal Instructions:

Complete this form, make one copy of it, then return the original and the copy to the Pro-se Office, United States District Court (S.D.N.Y.), 40 Centre Street, Foley Square New York, New York 10007.

The fee to file, docket and transmit your notice of appeal is $70.00, payable to the Clerk of Court, USDC. NO PERSONAL CHECKS ARE ACCEPTED.

If you wish to file your appeal without paying the fee, fill out the declaration of poverty form provided by the Pro-Se Office and submit it with your

notice. Note that this request to waive the fees need not be made if you were granted forma pauperis status when you commenced your action in this court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE SECURITIES AND EXCHANGE COMMISSION

V.

The American Board of Trade, Inc., Arthur N. Economou, Phyllis H. Economou, and the American Board of Trade

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Docket Number: 83 Civ. 6213 (SWK)

Judge KRAM

Notice of Appeal

To The United States Court of Appeals

For the Second Circuit

Notice is hereby given that JOHN F. ROMANN appeals to the United States Court

of Appeals for the Second Circuit from the decision and order of U.S.D.C. (S.D.N.Y.) dismissing her order to liquidate ABT on the 2nd day of February 198 7

DATED: March 4, 1987
New York, New York

cc. Opposing Party

John F. Romann
signature

Box 312 R.D. #4
address

Easton, PA. 18042

"U.S. District Court"
Pro Se Office
Filed
March 4, 1987
" S.D. of N.Y. "

SUPPLEMENTAL APPENDIX K

AO 83 ORIGINAL 143269
Rev. 7/83

Receipt for Payment

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

at

ROMANN

N/A 83 Civ 6213 (SWK)

Account Code

GENERAL AND SPECIAL FUND Account

331 Civil Cases 331

Amount

$ 70.00

Deputy Clerk D P

SUPPLEMENTAL APPENDIX L

Pro Se Office

UNITED STATES DISTRICT COURT
Southern District of New York
OFFICE OF THE CLERK
U.S. Courthouse
Foley Square, New York, N.Y. 10007

Raymond F. Burghardt, Clerk

To Cashier's:

Mr. Romann is filing an appeal, his papers are in order and he is paying the filing fee.

Thank you

Pro Se

SUPPLEMENTAL APPENDIX M

DISTRICT COURT FEE DUE LETTER

PLEASE REFER TO THIS DOCKET NUMBER IN ALL MATTERS

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
NEW YORK 10007

ELAINE B.GOLDSMITH,CLERK March 18,1987

John F. Romann
Box 312 RD #4
Easton, PA 18042

Re: SEC v. AMERICAN BD OF TRADE

Court of Appeals Docket No.

Dear Mr. Romann:

The court has been advised that a notice of appeal was filed in the above-entitled case on MAR 4, 1987 Within 10 days after filing the notice of appeal, you are required to pay the docket fee of

$65.00 to the Clerk of the District Court.

In the event the 10 day period has expired and you intend to pay the fee, follow the instructions on the attached sheet to apply to pay the fee out of time.

If you are indigent and unable to pay the fee you may apply for leave to proceed in forma pauperis. Your application to proceed in forma pauperis should first be presented to the Clerk of the district court. If your request is denied by the district court, you may apply to this court for the same relief. It is not necessary to apply to pay the fee out of time if you apply to proceed in forma pauperis.

If you are indigent and wish to have counsel assigned, you may include an application for assignment of counsel with your application to proceed in forma

pauperis. When you apply to this Court for that relief, this court reviews your entire appeal on the merits. It is possible, therefore, that your appeal will be dismissed on the merits during such a review, without oral argument.

In the event your application to proceed in forma pauperis is denied by the district court and you choose not to apply to this court for that relief or, if your application to this Court has been denied, your appeal will be dismissed unless you pay the docket fee within 10 days after service of notice of the court's decision.

PLEASE TAKE NOTE that, if within 15 days of the date of this letter, no fee has been paid and this court does not receive an application to pay the fee out of time or does not receive notice that you have applied in the district court to proceed

on appeal in forma pauperis, your appeal will be dismissed. FAILURE TO RESPOND ON OR BEFORE APR. 2, 1987 WILL RESULT IN THE DISMISSAL OF THIS APPEAL.

A sheet of instructions is enclosed for your guidance. However, following the procedures outlined is an assurance that the desires relief will be obtained.

Very truly yours,

Elaine B. Goldsmith, Clerk

PLEASE SEE REVERSE SIDE OF THIS LETTER FOR INSTRUCTIONS.

(The following Memorandum was received in an official U.S.C. USC 426 large letter sized envelope. The post mark date was 19 March 1987. Attached to the Memorandum was a copy of the above letter, with the word "V O I D" written in large black marking pen letters across the body of the letter, and a black " X "

written through the Court of Appeals Docket No."

UNITED STATES GOVERNMENT MEMORANDUM

TO: MR. ROMANN

SIR:

THE ENCLOSED LETTER WAS RECENTLY SENT TO YOU IN ERROR. PLEASE IGNORE SAID LETTER. YOUR NOTICE OF APPEAL IS BEING CONSTRUED AS A MOTION UNDER FRAP RULE 1292(b). IF AND WHEN YOUP MOTION IS GRANTED, the $65.00 DOCKETING FEE WILL BE DUE AND PAYABLE IN THE DISTRICT COURT.

THANK YOU.

BF MADSEN, DEPUTY CLERK
USCA, CASE OPENING UNIT